BRB No. 00-1034 BLA

DOROTHY M. HOWARD (Widow of ALFRED HOWARD)	)	
Claimant-Respondent	)	
v.	)	
VALLEY CAMP COAL COMPANY	)	
	)	DATE ISSUED: 08/30/2001
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

William S. Mattingly and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0645) of Administrative Law

Judge Daniel L. Leland awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The instant case involves a survivor's claim filed on May 18, 1998.[2] After crediting the miner with thirty-four years of coal mine employment, the administrative law judge found that collateral estoppel precluded employer from contesting the existence of pneumoconiosis. The administrative law judge further found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in admitting evidence untimely submitted by claimant while excluding employer's rebuttal evidence. Employer also argues that collateral estoppel should not have precluded it from contesting the existence of pneumoconiosis. Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The miner filed a claim for benefits on July 19, 1995. Director's Exhibit 36. Employer executed an "Agreement to Pay Benefits" on January 5, 1996. *Id.* In a Proposed Decision and Order dated January 23, 1996, the district director awarded benefits. *Id.* By letter dated February 16, 1996, employer noted its agreement with the Proposed Decision and Order and indicated that it would initiate payment of monthly benefits to the miner. *Id.* The miner's claim was in payment status when he died.

pneumoconiosis. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.[4]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the documents contained in Claimant's Exhibit 1-8 were admitted into the record in violation of 20 C.F.R. §725.456(b) and (d) (2000). At the hearing, claimant sought to admit various documents into the record, some of which were developed prior to 1991.[5] Citing 20 C.F.R. §725.456(d) (2000), employer objected to the submission of these documents.[6] Transcript at 10. Claimant's counsel indicated that he was

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[3]Claimant is the surviving spouse of the deceased miner who died on April 15, 1998. Director's Exhibit 10.

[4]Employer submitted an "Advisory of New Precedent" to the Board on February 5, 2001. We accept employer's submission of supplemental authority.

[5]Claimant submitted eight exhibits at the hearing. Claimant's Exhibit 1 is a July 9, 1991 report of the findings of the West Virginia Occupational Pneumoconiosis Board. Claimant's Exhibit 2 is a transcript of the June 19, 1996 testimony of members of the Occupational Pneumoconiosis Medical Board. Claimant's Exhibit 3 is Dr. Schroering's April 13, 1998 medical report. Claimant's Exhibit 5 is Dr. Horn's Death Summary dated October 25, 1996. Claimant's Exhibit 6 is Dr. Altmeyer's April 25, 1993 medical report and Claimant's Exhibit 7 is Dr. Altmeyer's curriculum vitae. Claimant's Exhibit 8 is Dr. Gaziano's June 16, 1990 medical report.

Claimant's Exhibit 4, an "Operative Report" prepared by Dr. Martinez-Salas on April 13, 1998, had already admitted into the record as part of Director's Exhibit 11.

Employer also appears to have mistakenly believed that Claimant's Exhibit 5 was also admitted as a part of Director's Exhibit 11. *See* Transcript at 10.

[6]Section 725.456(d) (2000) provides that:

> Documentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law

"frankly astounded that [this evidence] was not already in the record." Transcript at 12. Claimant's counsel also explained that he became aware that these documents were not in the record only a few days before the hearing. *Id.* at 13. Although claimant's counsel could not say that he did not have the documents, he explained that he was not aware that he had them or that they were not already in the record. *Id.*

In the absence of extraordinary circumstances, Section 725.456(d) (2000) mandates the exclusion of evidence obtained while the claim was before the district director but which has been withheld until the hearing before the administrative law judge. The Board has held that the exclusionary rule of Section 725.456(d) (2000) is not limited to situations where evidence is deliberately withheld, but to all cases in which the proponent withholds evidence until the claim is forwarded to the Office of Administrative Law Judges. *See Adams v. Island Creek Coal Co.*, 6 BLR 1-677 (1983). Establishing that a party was not surprised by the proffered evidence is insufficient to satisfy the "extraordinary circumstances" requirement. *Id.* In the instant case, the administrative law judge did not make a finding as to whether the necessary extraordinary circumstances existed so as to warrant the admission of the evidence contained in Claimant's Exhibits 1-8.[7] Accordingly, we remand the instant

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> Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim. (see §725.414(e)).

20 C.F.R. §725.456(d) (2000).

[7]At the hearing, the following exchange took place:

> [The Administrative Law Judge]: Well, the problem I'm having, certainly on the 20-day rule, they are a violation of that. I'm willing to accept counsel's explanation that he – they only came into possession recently, and that that's why he hasn't submitted them prior to today.
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> As far as whether they were withheld from the district director, I don't know. That's not clear to me, either, and I don't know whether – since I don't know when you received these exhibits, there's no way of my knowing whether they were withheld from the district director.
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> [Claimant's Counsel]: Your Honor, I wasn't retained on this case until it had already been set for hearing in Florida. I never saw the file when it was before the district director.

case to the administrative law judge for a proper determination of whether Claimant's Exhibits 1-8 should be admitted into the record pursuant to 20 C.F.R. §725.456(d) (2000).

At the March 22, 2000 hearing, employer also objected to the admission of this evidence because it was not exchanged at least twenty days prior to the hearing as required under 20 C.F.R. §725.456(b) (2000).[8] Transcript at 10. Claimant's Exhibits were not exchanged in compliance with the twenty day rule. Section 725.456 explicitly sets forth a standard of "good cause" which may justify admission of evidence not exchanged in compliance with the twenty-day rule.[9] The administrative law judge failed to make an explicit finding as to whether there was "good cause" for claimant's failure to submit the evidence at least twenty days prior to the March 22, 2000 hearing. Consequently, the administrative law judge, on remand, is instructed to make a proper determination as to whether good cause existed for claimant's failure to submit Claimant's Exhibits 1-8 at least twenty days before the hearing.

Employer also contends that the administrative law judge erred in excluding Dr. Altmeyer's May 30, 2000 report from the record. We disagree. The administrative law judge, having admitted Claimant's Exhibits 1-8 into the record despite that fact that this evidence was not exchanged at least twenty days prior to the hearing, appropriately granted employer the opportunity to respond to this evidence. *See* 20 C.F.R. §725.456(b)(3) (2000). The administrative law judge provided employer with sixty days from the date of the March 22, 2000 hearing to respond to Claimant's Exhibits 1-8. Transcript at 19. The administrative law judge noted that employer's post-hearing evidence was due on May 22, 2000. Decision

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> [The Administrative Law Judge]: Well, out of an abundance of caution, I'll admit the exhibits. I will have to give the employer a period of time to respond.

Transcript at 18.

[8]The twenty-day rule set out at 20 C.F.R. §725.456(b)(1) (2000) provides that materials not submitted to the district director "may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(1) (2000).

[9]Section 725.456 (2000) provides that documentary evidence, which is not exchanged twenty days before the hearing, may be admitted with the consent of the parties or upon a showing of good cause why such evidence was not timely exchanged. 20 C.F.R. §725.456(b)(2) (2000).

and Order at 2. The administrative law judge noted that the court received a faxed copy of Dr. Altmeyer's May 30, 2000 report on May 31, 2000. *Id.* Because the report was not filed within the sixty day limit, the administrative law judge declined to admit the report into evidence. *Id.* An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in excluding employer's post-hearing evidence.

Employer next contends that collateral estoppel should not have precluded it from contesting the existence of pneumoconiosis. For collateral estoppel to apply in the present case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant must establish that:

> (1) the issue sought to be litigated is identical to the one previously litigated;
> (2) the issue was actually determined in the prior proceeding;
> (3) the issue was a critical and necessary part of the judgment in the prior proceeding;
> (4) the prior judgment is final and valid; and
> (5) the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

See Sedlack v. Braswell Services Group, Inc., 134 F.3d 219 (4th Cir. 1998); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

When the miner's claim was adjudicated, employer did not contest the fact that the miner suffered from pneumoconiosis. *See* Director's Exhibit 36. At the time of the adjudication of the miner's claim, evidence sufficient to establish pneumoconiosis under one of the four methods set out at 20 C.F.R. §718.202(a)(1)-(4) obviated the need to do so under any of the other methods. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). However, subsequent to the issuance of the award of benefits in the miner's claim, the Fourth Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). In light of the change in law enunciated in *Compton*, which overrruled the Board's holding in *Dixon*, the issue of whether the existence of pneumoconiosis has been established pursuant to Section 718.202(a), which the administrative law judge found was precluded in the present survivor's claim pursuant to the doctrine of collateral estoppel, is not identical to the one previously litigated and actually determined in the miner's claim. *See Sedlack*, *supra*; *Hughes*, *supra*. Thus, inasmuch as each of the prerequisites for application of the doctrine of collateral estoppel is not present,

we hold that the doctrine of collateral estoppel is not applicable in this survivor's claim regarding the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge, on remand, is instructed to reconsider the evidence and determine whether it is sufficient to establish the existence of pneumoconiosis in accordance with the standard enunciated in *Compton.*[10] Moreover, inasmuch as the administrative law judge's finding at 20 C.F.R. §718.202(a) is determinative of his finding that death due to pneumoconiosis was established under 20 C.F.R. §718.205(c), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c). If the administrative law judge, on remand, finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he should then reconsider whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. 718.205(c), the administrative law judge stated that:

> Dr. Horn, who treated the decedent during the last days of his life and signed his death certificate, concluded that his death was due to pneumoconiosis. Dr. Morgan and Dr. Fino attributed the decedent's demise to IPF and determined that he did not have coal workers' pneumoconiosis, but

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[10]Employer contends that the administrative law judge failed to consider all of the x-ray interpretations of record. Employer's contention has merit. The administrative law judge failed to consider Dr. Morgan's interpretation of the miner's January 11, 1995 x-ray. Employer's Exhibit 3. The administrative law judge also failed to consider the interpretations of the miner's November 24, 1997 x-ray rendered by Drs. Wiot, Spitz, Shipley, Scott, Wheeler, Morgan and Fino. Director's Exhibits 27, 28, 31; Employer's Exhibits 3, 6. On remand, the administrative law judge is instructed to consider this evidence, along with all other relevant evidence, pursuant to 20 C.F.R. §718.202(a).

> as it has been established that he did not have coal workers' pneumoconiosis, their opinions on the cause of death can not be given any weight. I, therefore, credit the opinion of Dr. Horn and I find that the miner died due to pneumoconiosis.

Decision and Order at 10 (footnote omitted).

The administrative law judge also noted that "Dr. Salari stated that pneumoconiosis contributed to the miner's death but had earlier testified that he had no opinion on the cause of death." Decision and Order at 10 n.3.

Employer contends that the administrative law judge failed to adequately scrutinize Dr. Horn's opinion.[11] We agree. The administrative law judge failed to address whether Dr. Horn's opinion regarding the cause of the miner's death was sufficiently reasoned. Consequently, the the administrative law judge, on remand, is instructed to address whether Dr. Horn's opinion is sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge should also address the opinions of physicians who questioned Dr. Horn's conclusions.[12]

Employer finally argues that the administrative law judge erred in discrediting the opinions of Drs. Morgan and Fino because they did not diagnose pneumoconiosis. We

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[11]Dr. Horn completed the miner's death certificate. Director's Exhibit 10. Dr. Horn attributed the miner's death to respiratory failure due to pneumoconiosis. *Id.* In a subsequent Death Summary dated October 25, 1998, Dr. Horn indicated that the miner died "from a result of his end-stage lungs [sic] disease and hypoxia." Claimant's Exhibit 5.

[12]Claimant, in her response brief, contends that the administrative law judge failed to properly address the opinion of the miner's treating physician, Dr. Salari. The administrative law judge noted that "Dr. Salari stated that pneumoconiosis contributed to the miner's death but had earlier testified that he had no opinion on the cause of death." Decision and Order at 10 n.3. In a deposition dated April 2, 1999, Dr. Salari indicated that he could not express an opinion regarding the exact cause of the miner's death because he was not the miner's attending physician during his final hospitalization and because he had not had an opportunity to review records concerning the miner's death. Employer's Exhibit 2. However, Dr. Salari subsequently opined that pneumoconiosis definitely contributed to the miner's death. *Id.* at 28. Given Dr. Salari's earlier statement that he was not in a position to provide an opinion regarding the cause of the miner's death, we hold that the administrative law judge acted within his discretion in finding that Dr. Salari's opinion was insufficient to support a finding that the miner's death was due to pneumoconiosis.

agree. Even though an administrative law judge has found that a miner suffers from pneumoconiosis, a physician's opinion regarding the miner's cause of death premised on an understanding that the miner does not have pneumonoconiosis may arguably still have probative value.[13] *See generally Dehue Coal Co. v. Ballard [Ballard]*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *see also Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). A medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's death, is relevant because it directly rebuts evidence that pneumoconiosis contributed to the miner's death.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[13]The Fourth Circuit has explained that a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193, 19 BLR 2-304, 2-315-2-316 (4th Cir. 1995).